United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1376

To be argued by
IRVING ANOLIK

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

DOMINIC TORTORELLO,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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UNITED STATES OF AMERICA,

Appellant,

-against-

DOMINIC TORTORELLO,

Defendant-Appellee.

- -x

DEFENDANT-APPELLEE'S BRIEF

PRELIMINARY STATEMENT

The defendant-appellee, Tortorello, is responding and opposing the appellant's appeal for reversal of an order of District Judge Lloyd MacMahon suppressing certain evidence consisting of a number of cartons of coffee. The order from which the Government is appealing was dated August 29, 1975, but was not filed until September 3, 1975.

We ask this Court to note that the motion which the Government made pursuant to Rule 9(m) of the General Rules for the Southern District of New York, for reargument of the District Court's decision dated August 29, 1975, which granted

defendants' motion to suppress certain evidence, was denied by Judge MacMahon and consequently is not before this Tribunal.

The District Court had the power, of course, pursuant to Rule 45(b) of the Federal Rules of Criminal Procedure to extend the Government's time to move for reargument provided the District Judge was satisfied that the Government had established "excusable neglect". Judge MacMahon, however, ruled that no such demonstration was made and consequently refused to exercise his discretion and did not grant the motion for reconsideration.

We ask this Court to therefore disregard every aspect of that.

The appellant herein seeks nevertheless to have this Court take notice of the decision of Judge MacMahon with respect to his denial of the Government's motion for reargument. Within that decision is dicta to the effect that upon reflection he was inclined to agree that Tortorello did not have "standing" to move to suppress. That, however, is not before this Court since the Government never challenged the standing of the defendant in the Court below. Its belated attempt to do so is completely meaningless since it waited

approximately 30 days, and in view of the statutory provisions to which we have already adverted, namely Rule 9(m) of the General Rules for the Southern District of New York and Rule 45(b) of the Federal Rules of Criminal Procedure, they are barred from bringing this matter up for review.

JURISDICTIONAL CONSIDERATIONS
THE APPEAL SHOULD BE DISMISSED.

The Government apparently filed its Notice of Appeal from the decision of Judge MacMahon which was dated August 29, 1975, on the 3rd day of October, 1975. The decision of Judge MacMahon was not filed until September 3, 1975. Assuming that thisCourt therefore finds that the Notice of Appeal was filed within 30 days, we nevertheless maintain that the Government is barred from bringing this matter before this Court.

The Government, by its own admission (A136) concedes that on or about August 28, 1975 it advised Judge MacMahon that no appeal would be taken. We maintain that this was a waiver of their right to appeal.

Notwithstanding this fact, however, the Government declares that they were remiss in that only the office of the Solicitor General under Justice Department regulations was empowered

to decide whether orders adverse to the Government will be appealed. (Appellant's original Memorandum in this Court p.5)*.

District Judge MacMahon, about whom this Court can take judicial notice, was formerly head of the Criminal Division of the United States Attorney's Office. In his opinion denying the motion for reargument, he noted with respect to the Government's excuse as to why it should be permitted to appeal, that "anyone with any experience in government knows that such slips are more the rule than the exception" (A137).

In Santobello v. New York, 404 U.S. 257, the Supreme Court of the United States expressly held that the left hand must know what the right hand is doing in a prosecutor's office and, consequently, we maintain that the Government may not excuse its own neglect by stating that the Solicitor General was not consulted after it specifically and intelligently waived the right to appeal.

Nothing which occurred before the District Court with respect to the motion for reargument is before this Court in view of the fact, as we have already noted, the District Judge below denied leave to reargue and consequently no

*Strangely this argument has not been pressed herein.

reargument occurred. There can be no appeal consequently from a decision denying reargument since it is purely discretionary with the District Court (General Rules for the Southern District of New York, Rule 9(m), and Rule 45(b) of the Federal Rules of Criminal Procedure).

Additionally, transcript of proceedings which are annexed to the moving papers of the appellant failed to reveal any claim by the Government that Tortorello lacked standing to object to the admission of the evidence which was the subject matter of the motion to suppress.

We should also point out that the Government's brief (p.9) wherein it declares that its motion for reargument was "unopposed" is not correct. Footnote 1 of Judge MacMahon's opinion of November 14, 1975, specifically declares that the defendant-appellee did not waive objection to the untimeliness of the Government's motion.

ARGUMENT

POINT I

ASSUMING THAT THIS COURT REACHES THE MERITS OF THE ISSUES PRESENTED ON THE APPEAL, THE APPELLEE MAINTAINS THAT THERE WAS AMPLE BASIS FOR SUPPRESSING THE EVIDENCE. TORTORELLO CLEARLY HAD STANDING TO COMPLAIN ABOUT THE SEARCH AND SEIZURE SINCE IT WAS HIS CONSENT WHICH WAS SOUGHT TO SEARCH THE BASEMENT OF A HOME OCCUPIED BY HIS OWN PARENTS, SISTER AND BROTHER-IN-LAW. MOREOVER, THE GOVERNMENT CONCEDED STANDING IN THE COURT BELOW.

The Government, in its brief and in its moving papers, has summarized and set forth the facts adduced in the Court below.

It is conceded by the Government that federal agents went to the home of the co-appellee, Hoffman. That home was occupied by Hoffman and his wife, the latter being Tortorello's sister, and Tortorello's mother and father. In fact, appellee Tortorello had himself been a resident of that house up to eight months prior to the search and seizure.

On April 30, 1973, F.B.I. Agents Lester Hay and three others, without search or arrest warrants, went to the premises in question, namely 2258 Hermany Avenue in the Bronx. Hay approached the front door and after a conversation with Hoffman, went to the garage where they examined certain cases of allegedly

stolen coffee (A28). Agent Hay asked Hoffman for permission to search the second floor of the house but was refused on the grounds that it would upset his parents-in-law, who were ill (A29).

The federal agents then requested permission to search the basement, but Hoffman refused on the ground that he had no authority to allow such a search (A29, 40-42).

At the agents' insistence, Mrs. Hoffman telephoned her brother, the appellee Dominic Tortorello, who arrived at the house about fifteen minutes thereafter (A97-98).

After advising Tortorello of his rights and receiving a written waiver, Hay and two other agents had a conversation with Tortorello in their automobile about the stolen coffee, including their discovery in the garage (A30, 49-50).

The agents then requested that he permit a search of the basement, after which insistence Tortorello executed a written consent to search (A31-32).

The agents were taken to the basement by Tortorello and discovered the 250 cases of stolen coffee, which are the subject of the indictment.

It is obvious that on the one hand at the hearing, the Government was relying upon the consent of Tortorello to

justify the search of the basement. Now for the first time on this appeal, they take the position that Tortorello had no right to grant them any consent because he had no standing to object in the first place. This was not the position which was taken during the hearing in the Court below. It is obvious that the Government was seeking to adduce evidence against both Hoffman and Tortorello, and not Tortorello alone. It is therefore clear that they were not raising any question of jurisdiction or standing so far as Tortorello was concerned, vis-a-vis the search.

It is submitted that while the opinion of Judge MacMahon on November 14, 1975 may not be reviewed for the purpose of considering the reargument, it is nevertheless instructive as to the Findings of Facts and Conclusions of Law that the Judge made with respect to his original decision of August 29, 1975. Judge MacMahon had not expatiated in that August 29th decision since the Government had assured him that it would not appeal. Thus, the Finding and Conclusion of Judge MacMahon with respect to the search is contained on page 10 of his November 14th opinion wherein he says, inter alia (A144):

> "There were no exigent circumstances here. The two agents who went to the rear of the Hermany Avenue house were mere trespassers.... The agents had

> sufficient information to obtain a search warrant at least four or five days before they went to the Hermany Avenue house on April 30th, 1973. Indeed, there was no attempt whatsoever to assert at the hearing a valid reason for the failure of the F.B.I. to obtain a search warrant. Therefore this search was unreasonable."

The Court below then turned to the question of "standing". The District Judge opined further on page 11 of his November 14th decision (A145):

> "We specifically requested the parties to address this point [standing] in a post-hearing memorandum. The government's memorandum conceded that both defendants had standing under the 'automatic standing' rule of Jones v. United States, 362 U.S. 257 (1960), that is, in a criminal prosecution in which possession is an essential element of the crime, a defendant automatically has standing to raise Fourth Amendment objections to seized evidence."

In its decision of November 14th, 1975, the Court declares that it was incorrect with respect to its determination that Tortorello had standing when it rendered its decision on August 29th.

We must bear in mind, however, that this aspect of the case is not before this Tribunal. The Court was considering a motion for reargument where the Government was shifting its position. Prior to the motion for reargument the Government

had taken the position that there was no issue of standing since the Court found that the Government had conceded that both Tortorello and Hoffman in fact had standing. It was only after the motion for reargument was filed some 30 days after the Court's original decision that the Government suddenly came to the conclusion that it should not have made that concession and that in any event Tortorello did not have standing.

The Government's point of view has shifted again. Not only did it take an appeal from Judge MacMahon's determination suppressing evidence against both Hoffman and Tortorello, but now in this Court has abandoned its claim with respect to Hoffman altogether.

Thus, the Government seems to be vacillating in a very undecisive manner.

We have already adverted to the fact that the appellant may not hide behind the smoke-screen that the Solicitor General did not make a determination that no appeal should be taken because his consent or approval was not sought until about 30 days after the decision not to appeal. The Court below noted from vast experience that such slips are the rule rather than the exception.

Moreover, under the case of Santobello v. New York, 404 U.S. 257 [a case argued by the writer of this brief in the Supreme Court of the United States], the Supreme Court held that in a prosecutor's office the "left hand must know what the right hand is doing." It is no excuse, therefore, that the United States Attorney's office declared that no appeal would be taken and now seeks to excuse that waiver by asserting that it had no right to make such a statement. If that is the case, then all cases should be handled directly by the Solicitor General and not by the United States Attorney's office altogether since apparently this would mean that when one deals with the U.S. Attorney's office in the Southern District, they are not dealing in any binding manner at all, but must await word from the Solicitor General in Washington.

We maintain that between the United States Attorney's office and the Solicitor General, there may have been some slip-up. If so, it is unfortunate, but, according to Judge MacMahon who has vast experience in this area and was a former Chief of the Criminal Division of the United States Attorney's office, such mistakes are typical. No defendant, however, and no Court, should be bound to recognize such mistakes as jurisdictionally sufficient to warrant granting of either

reconsideration or rendering determinations of United States Attorney's office as meaningless.

Once the Government, through the United States Attorney, gives its representation, that should be deemed binding irrespective of whether or not a slip-up has occurred.

In any event, we do not concede the reasoning of Judge MacMahon or the Government to be valid with respect to the issue of standing under any circumstances.

Under Jones v. United States, 362 U.S. 257 (1960) and McDonald v. United States, 335 U.S. 451 (1948), the Supreme Court has clearly indicated that standing exists where a person is on the premises of any edifice wherein the search and seizure occurs.

In the case at bar it is manifest that at the agents' behest, Tortorello was brought to the Hermany Avenue home, and it was he who was looked to, to give consent to enter the basement. It would appear that the occupants of that house had certainly ceded to the appellee Tortorello the proprietary interest necessary to grant consent or to refuse consent.

We maintain that in view of the close relationship by affinity and consanguinity with the occupants of the Hermany Avenue home, namely the mother and father of Tortorello, as

well as his sister and brother-in-law, would grant him much more than the ordinary nexus with such a home.

The co-appellee, Hoffman, declared that he had no authority to grant consent to search the basement. The other occupant of that apartment, namely Mrs. Hoffman, who is Tortorello's sister, at the behest of the agent, was told to call Tortorello, since apparently it was he who would have authority to grant such consent. We maintain that the consent, however, which was granted by Tortorello, was not the true type of voluntary consent that one should expect, but rather was in response to lawful authority.

See Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

See also, Brown v. Illinois, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

We must bear in mind that Tortorello was requested to come over by Federal Bureau of Investigation agents and was taken into their car and was interrogated. We must therefore presume, as we have a right to, that he was not in a position where he could just walk away.*

*Thus, the argument of the Government that Tortorello was not in "possession" of the coffee is not persuasive, since he was actually on the premises searched at the instance of the Government. Brown v. United States 411 U.S. 273, 229 is therefore not applicable.

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. (Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19; and United States v. Brignoni-Ponce, 45 L.Ed.2d 607 (1975)).

"Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," Terry v. Ohio, supra, at 16, . . . and the Fourth Amendment requires that the seizure be "reasonable".

We therefore maintain that under the circumstances described in the record herein, Tortorello was not merely some guest but was in the custody of the F.B.I. agents. He was brought over to the Hermany Avenue address and then interrogated, not with a view toward passing the time of the day, but clearly with a view toward incriminating him with respect to the stolen coffee.

The Government, however, in any event concedes that Hoffman had standing. We maintain then, where one of two co-defendants actually on trial together have standing to object to the admission of evidence which has been seized, that the evidence may not be adduced against anyone on trial.

In a joint trial, since timely objections were made,

Tortorello would be prejudiced by the use of illegally seized evidence which was employed against him and his co-defendant.

A case almost directly in point, is Rosencranz v. United States, 334 F.2d 738, where, as here, the Government, on reargument sought to raise a "standing" question. There, the Court of Appeals (1st Cir.) rejected the argument. At 740 of 334 F.2d, the Court explained:

> "Here, a timely pre-trial motion to suppress was made by Amorello, and there is no doubt but that the trial court's erroneous denial of that motion severely prejudiced appellants since the seized materials formed a substantial part of the evidence used to convict them. In such a case, where the wrongful denial of a motion to suppress is prejudicial to both the defendant making the motion and his co-defendants as well, the right to have such evidence excluded from the trial cannot be limited to the defendant who originally made the motion to suppress. Were we to hold otherwise, the failure of the moving defendant to appeal would leave his co-defendants prejudiced by the wrongful denial of the motion to suppress but unable 'to present their grievance before any court.' See Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 1035, 97 L.Ed. 1586 (1953). We do not believe that it was the intention of the Supreme Court in McDonald to give a defendant this right and then make its exercise contingent upon whether or not the movant decided to take an appeal. See annotation 96 L.Ed. 76."

See also Schoeneman v. United States, 317 F.2d 173 (D.C. 1963); Hair v. United States, 289 F.2d 894 (D.C. 1961); Barnett v. United States, 384 F.2d 848, 862 (5th Cir. 1967); Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966); and United States v. Tomailo, 249 F.2d 683 (2d Cir. 1957).

It will be noted that in the Rosencranz case, supra, the Court of Appeals recognized that it would be impossible to have a fair trial where illegally seized evidence is introduced, even though a co-defendant who, pretrial, may not have had "standing", has objected to the introduction of that evidence.

The situation is not unlike that presented in Bruton v. United States, 391 U.S. 123 (1968) and People v. Jackson, 22 N.Y.2d 446.

See also the cases of McDonald V. United States, 335 U.S. 451 (1948) and Jones v. United States, 362 U.S. 257 (1960).

In Barnett v. United States, 384 F.2d 848, supra (Fifth Cir. 1967) the Court similarly ruled that as to jointly tried defendants, introduction of the fruits of an illegal search of one mandates reversal as to all. Thus at 384 F.2d at 862:

> "The failure to suppress the evidence from the search of the automobile by the state officers requires reversal

> as to all three appellants. Barnett's interest in the automobile is not clear from the record, but even if the search did not invade his constitutional rights he was sufficiently prejudiced by the introduction of the fruits of this search to require reversal under the rule of McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). See Gillespie v. United States, 368 F.2d 1, 6-7 (8th Cir. 1966). Rosencranz v. United States, 334 F.2d 738 (1st Cir. 1964); Schoeneman v. United States, 115 U.S. App. D.C. 110, 317 F.2d 173, 174 n.5 (1963); Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961); United States v. Tomaiolo, 249 F.2d 683, 696 (2d Cir. 1957).
> Reversed and remanded."

The appellant has missed the point, as did the Court below in its opinion of November 14th; the point being that where co-defendants are jointly tried and at least one of them has definite standing to suppress, both have the right to exclude evidence illegally seized from either. The suppression motion was being heard jointly. No one ever raised the issue of standing, so it was never questioned, nor was proof adduced.

We ask the Court to bear in mind that we are not conceding that Tortorello lacks standing, but are maintaining arguendo, that even if he did not have standing, he still has the right to exclude illegally seized evidence from a co-defendant

actually on a hearing with him.

POINT II

THE EVIDENCE HEREIN SHOULD HAVE BEEN SUPPRESSED IN ANY EVENT SINCE IT WAS TAINTED AND THE "FRUITS OF A POISONOUS TREE". THE APPELLEES HAD BEEN ARRESTED FOR BEING IN POSSESSION OF STOLEN COFFEE FIVE DAYS EARLIER BY STATE AUTHORITIES AND IT IS MANIFEST THAT THE FEDERAL AGENTS CONDUCTED THEIR TRESPASSORY AND WARRANTLESS SEARCH OF THE HERMANY AVENUE HOME AS A RESULT OF THE KNOWLEDGE WHICH MUST HAVE BEEN IMPARTED TO THEM BY THE STATE AUTHORITIES. IN ANY EVENT, THE AGENTS HAD MORE THAN ENOUGH TIME TO OBTAIN A SEARCH WARRANT.

All searches without a warrant are presumptively violative of the Fourth Amendment unless they come within a recognized exception to the rule requiring such warrants. The only such exceptions would involve a consent search or a search incident to a lawful arrest. (Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

In the case at bar, during the hearing itself and the legal arguments made in connection therewith, the Government's position was that Tortorello gave a valid consent to the search. We have already analyzed our reasons for maintaining that the consent was really submission to lawful authority and was not the product of a free will. Tortorello was obviously already

under arrest by state authorities and had been summoned to the Hermany Avenue address at the behest of federal agents who proceeded to interrogate him in a car.

Additionally, however, no lawful arrest had yet taken place so there was no search incident to a lawful arrest. Assuming, however, that a lawful arrest had occurred, it would certainly not warrant searching the basement since that would have been inconsistent with the rules permitting a search incident to an arrest which must be in an area in the immediate vicinity of the person arrested and not at some remote point (Chimel v. California, 395 U.S. 752).

We must bear in mind further that this was not a search conducted in the course of "hot pursuit" (Warden v. Hayden, 387 U.S. 294); nor was it a search conducted in an emergency situation or exceptional circumstances (Terry v. Ohio, supra; Schmerber v. California, 384 U.S. 757; Johnson v. United States, 333 U.S. 10; or McDonald v. United States, 335 U.S. 451).

Moreover, this was not a search in an open non-private area (Hester v. United States, 265 U.S. 57); nor did it involve abandoned property (Abel v. United States, 362 U.S. 217).

Since admittedly federal agents conducted the search,

we do not have an exception relating to private persons (Burdau v. McDowell, 256 U.S. 465; Sackler v. Sackler, 15 N.Y. 2d 40). The Court below should have also suppressed on the "fruit's" doctrine.

In short, there were no exceptions under which the federal agents could proceed.

The Government having taken the positionin the Court below on the original hearing, that Tortorello had standing since they were relying upon his consent to authorize the search, have now shifted not only from that position by claiming that he had no standing, but also take the position now that his co-appellee, Hoffman, should have secured a proper suppression of evidence.

The Government really is arguing that it may conduct "exploratory searches". In other words, it could deliberately conduct a trespassory search of Hoffman's abode and use any evidence found against a person who is not a resident there, irrespective of the fact that the search was admittedly invalid. Without Tortorello's arrest, no one would have permitted the agents to the basement.

We must bear in mind that the entire hearing in the Court below predicated itself upon the fact and argument

that the F.B.I. agents had acted properly within the purview of a consent search. The Government, however, cannot have their cake and eat it too. They cannot shift their position and state that the facts adduced are no longer valid.

Having failed in their attempt to secure a reargument, they are now precluded from raising issues which were presented during the reargument. They are concluded by the factual determinations made by the Court below with respect to the only valid motion which is before this Court. That includes the decision thereon which culminated in the August 29th opinion of Judge MacMahon, which was filed on September 3rd.

The F.B.I. had almost one week within which to secure a search warrant, and failed to do so. They did not even have an excuse for not having made such an attempt. The activities in obtaining the coffee in the basement of the Hermany Avenue house was clearly violative of every concept of fairness and certainly a gross affront to the Fourth Amendment. The seizure of the coffee in the basement was the product of the "fruits of a poisonous tree". (Nardone v. United States, 308 U.S. 338; Silverthorne Lumber Company v. United States, 251 U.S. 385; and Brown v. Illinois, supra).

See too, Katz v. United States, 389 U.S. 347 and United States v. Marotta, 326 F.Supp. 377 (S.D.N.Y. 1971).

CONCLUSION

In view of the foregoing, it is respectfully submitted the motion for summary reversal should be denied and Judge MacMahon should be affirmed in all respects.

Respectfully submitted,

Joseph P. Carozza
Attorney for Appellee

Irving Anolik,
Of Counsel

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE PEOPLE OF THE UNITED STATES,
APPELLANTS,

- against -

TORTORELLA,
APPELLEE.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 27th *day of* January *19* 76 *at* 1 St. Andews Plaza, New York, New York

deponent served the annexed Brief *upon*
ROBERT B. FISKE UNITED STATES ATTONEY-~~XXXXXX~~ SOUTHERN DISTRICT

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 27th
day of January *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA